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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 323

WALLACE C. FRANKLIN, JR., Regional Counsel, Wage Stabilization Board, Region X; JOSEPH A. JENKINS, Chief Enforcement Attorney, Wage Stabilization Board, Region X; T. D. STARNES, Enforcement Commissioner, *Defendant-Appellants*

v.

JONCO AIRCRAFT CORPORATION, *Plaintiff-Appellee.*

PETITION FOR REHEARING AND STAY OF MANDATE

JOHN K. PICKENS
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(Plaintiff-Appellee)

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Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

JONCO AIRCRAFT CORPORATION, *Plaintiff-Appellee.*

PETITION FOR REHEARING AND STAY OF MANDATE

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States

Your petitioner, the plaintiff-appellee, respectfully requests that this Honorable Court reconsider its action of November 9, 1953, reversing the judgment of the three-judge United States District Court for the Northern Dis-

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trict of Texas; that the order then entered in this matter be vacated; that this matter be set down for oral argument; and that the mandate of this Court in this matter be stayed until rehearing be had.

Your petitioner, believing that the defendant-appellants possessed an appeal to this Court, as of right, from the decision of the three-judge court below did not oppose the assumption of jurisdiction of this matter by this Court. Jurisdiction in this matter was not noted by this Court prior to its per curiam opinion of November 9, 1953. Consequently, your petitioner did not file a brief or memorandum on the merits which would have pointed out numerous inaccuracies and errors both of fact and of law contained in the statement of jurisdiction filed on behalf of the United States. Such statement as to jurisdiction was in reality a brief on the merits. In fact, the Government adopted as its statement of points to be relied upon in its brief and on oral argument on the merits the assignment of errors contained in such statement as to jurisdiction. This Court rendered its decision of November 9, 1953 without the benefit of a brief, memorandum of law, or oral argument setting forth the position of plaintiff-appellee.

The consideration of this matter on the merits will show that this matter is not governed by the decisions of this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, or *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U.S. 237. Your petitioner has had no opportunity as yet to demonstrate that it possessed no statutory administrative remedy which it could pursue or exhaust.

It is respectfully submitted that petitioner should be accorded the opportunity to file a brief and present oral argument before it is foreclosed by an opinion of this Court reversing the decision of the three-judge statutory Court.

I.

PLAINTIFF-APPELLEE HAD NO VALID ADMINISTRATIVE REMEDY THAT IT COULD PURSUE OR EXHAUST

On the question of exhaustion of administrative remedy the factual situation in the case at bar is unique. It is one of novel impression that is not controlled by any present holding of this Court.

The Defense Production Act of 1950, as amended, (50 USC, App. 2016) contains no provision authorizing the issuance of an administrative enforcement complaint or the filing of an answer, the holding of an administrative hearing, or any procedure as to notice, service of process, right of counsel, taking of testimony, hearing of argument, issuance of an intermediate or proposed report, or any requirement as to findings of fact or the quantum of evidence required to sustain such a determination, or as to the certification or preservation of records. No right of judicial review is given; in fact, by regulation, the citizen is foreclosed from such a fundamental right.

The agency relies on the language contained in Section 405(b) of the Defense Production Act (50 USC App. 2105(b)) as granting it authority to hold administrative enforcement hearings as follows:

> "The President shall also *prescribe the extent to which any wage*, salary, or *compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments* and other governmental agencies *in determining the costs or expenses of any employer for the purposes of any other law or regulation.*"

This language, we submit, does not grant the agency any authority to issue complaints, hold hearings and make determinations as to how much of the total payroll shall be disregarded by the various governmental departments

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and agencies in determining the costs and expenses of an employer.[1]

No administrative procedure, for which violations of Wage Stabilization Rules and Regulations, is provided are authorized by any statute of Congress. Appellee has no valid administrative remedy which it can pursue, let alone one which it can exhaust.[2] Where administrative relief is

---

[1] Where Congress intended to provide for administrative enforcement procedure, they have clearly set forth their intention in specific language as was done in the provisions of the National Labor Relations Act (29 U.S.C. 160), the Federal Trade Commission Act (15 U.S.C. 45(b)), the Public Utility Holding Company Act (15 U.S.C. 79k(b)), and others.

Section 9 of the National Labor Relations Act, as amended, grants that Agency power to conduct administrative hearing by the use of the following language:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * *shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board* * * at a place therein fixed, not less than five days after the serving of such complaint."

[2] That those administering the program during the period 1942-47, when Congress had made a formal declaration of war, had some constitutional doubts is illustrated by statements contained in the final report to the Secretary of Labor in December 1950. See the statement of Mr. Benjamin Aaron, former Executive Director, National War Labor Board at page 354 of Bulletin No. 1009 U. S. Department of Labor entitled "Problems and Policies of Dispute Settlement and Wage Stabilization During World War II" where he says

> "The very broad and practically undefined authority granted by the Stabilization Act to the President, not only to set up the stabilization rules but also to prescribe the penalties for violation, represented a departure from normal legislative practice. The further delegation of wide enforcement powers to the Board, as provided in the regulations of the Economic Stabilization Director, raised a specter of unconstitutionality which haunted some members of the Board's legal staff throughout the period in which the Stabilization Act was in force."

improbable or nugatory, equitable relief in the Federal Courts is appropriate even though statutory administrative remedies have not been exhausted. *Order of Railway Conductors* v. *Swan*, 329 U.S. 520.

Administrative enforcement proceedings are not authorized by the enabling statute. On the other hand, any administrative hearing held pursuant to administrative fiat would not be governed by the provisions of the Administrative Procedure Act as all functions exercised pursuant to the provisions of the Defense Production Act are specifically exempt therefrom.

The hearing officers of the National Enforcement Commission were assigned on a case-to-case basis. They were paid at a per-diem rate. They were thus subjected to the pressure of the purse, an evil which the principles of American jurisprudence have reviled since colonial times. If a hearing officer's initial decision displeased the agency in any way, it could result in the refusal of the Agency to assign any more cases for hearing before such officer. Such officers were bound by the interpretations, regulations and policies of the Wage Stabilization Board and the National Enforcement Commission.

These agencies were temporary in nature and had no history of fairness and orderly procedures. The very functions assigned to them and the broadness of the delegation made expediency the uppermost consideration. Their rules and regulations changed from day to day. No one can deny this. Although General Wage Stabilization Regulation Number 1, was promulgated on January 25, 1951, and all wages were frozen as of that date, the National Enforcement Commission was not established until July 1952. This Commission was composed of three members. It was not a part of Economic Stabilization Agency or Wage Stabilization Board as required by statute in this case. It was not tri-partite. Labor and industry had no representative on the agency engaged in administrative enforcement as required and as had been

the case in connection with the Stabilization Act of 1942 and its administration during and after World War II. During the short life of the National Enforcement Commission which covered some 13 months, the three positions on the Commission were held by at least eight different individuals. Its policies changed almost from day to day. There was no continuity of membership or policy. No opportunity existed for acquiring expertise that an administrative agency is supposed to possess.

II.

IF YOUR PETITIONER HAD AN ADMINISTRATIVE REMEDY TO EXHAUST, EVEN THOUGH INVALID AND UNCONSTITUTIONAL, SUCH REMEDY CEASED TO EXIST AFTER OCTOBER 31, 1953

Admittedly Title IV of the Defense Production Act provides that all authority under its provisions expire on April 30, 1953. At the hearing before the three-judge statutory court on June 11, 1953, your petitioner contended the power of these temporary agencies to proceed with administrative enforcement functions ceased as of April 30, 1953, if not before. That Court held in accordance with this view. The only authority by which these agencies contended they could carry on the hearing sought to be enjoined was the six months liquidation provision contained in Section 717 of that Act. The Government did not contend, at that time, that it possessed any authority beyond October 31, 1953.

However, now in their statement as to jurisdiction, the government contends that Executive Order Number 10494 continues such enforcement power even though it has long since ceased. They would have this Court believe that the same authority exists for the continuance and transfer of this power as did in 1947 when the President transferred the functions under the Emergency Price Control Act of 1942. This is not the fact. The First War Power Act was in existence and authorized the transfer of functions from

one agency to another. During the time the prior Act was in effect the United States was fighting a global war pursuant to a declaration of war by Congress. Congress has made no declaration of war during the period of the existence of the Defense Production Act of 1950. No constitutional basis for this legislation, its administrative procedure, or the extension thereof beyond October 31, 1953, has been asserted by the Government except some sort of vague inherent power which this Court held in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, did not exist.

As this Court recognized in *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144, " * * * that if the war power can be used in days of peace to treat all the wounds that war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well."

Mr. Justice Jackson, concurring in a separate opinion, stated the same fear in even stronger language. He said at pages 146 and 147:

> "The Government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable 'war power.'
>
> "No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is interpreted by the Judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.
>
> "Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care."

III.

THE FACTUAL SITUATION PRESENT HERE BRINGS THIS CASE WITHIN THE DECISION OF THIS COURT IN AIRCRAFT & DIESEL EQUIPMENT CORPORATION v. HIRSCH AND RELATED CASES

This situation is the type to which Mr. Justice Rutledge was referring in this opinion in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, writing for this Court[3] in a unanimous decision, when he stated that

> "* * * the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention."

It is well settled that where a statute, prohibiting an official from performing in a particular situation, is so clear as to be free from doubt as to what is prescribed, a court will enjoin a violation of the act even though the victim has not pursued his administrative remedies. *Miquel* v. *McCarl*, 291 U.S. 442, *Waite* v. *Macy*, 246 U.S. 606; *Roberts* v. *U.S.*, 176 U.S. 221, 229-31; *Farley* v. *U.S.*, 92 F. 2d 533; *Chambers* v. *Robertson*, 183 F. 2d 144, 146.

Where it is charged that an order or regulation of an administrative agency or official is void because the enabling act is unconstitutional or that the agency has exceeded the authority granted it by Congress, it is not necessary that administrative remedies be exhausted before invoking judicial process. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218; *Public Utilities Commission* v. *Fuel Gas Co.*, 317 U.S. 456; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407; *Skinner & Eddy Corporation*

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[3] See also *Fay* v. *Douds*, 172 F. 2d 720 (CA 2) Judge Learned Hand at p. 723.

v. *United States*, 249 U.S. 557[4] Cf. *Varney* v. *Warehime*, 147 F. 2d 238, 243 *cert. den.* 325 U.S. 882; *Chambers* v. *Robertson*, 183 F. 2d 144, 146 (1949), and *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498.

IV.

THE FACTUAL SITUATION PRESENT HERE PRECLUDES THE APPLICATION OF THE DOCTRINE OF MYERS v. BETHLEHEM SHIPBUILDING CORPORATION

We submit that many of the Federal Courts are either not following the authority of this Court or are wrongly interpreting many of the decisions of this Court since *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41. The doctrine of the exhaustion of administrative remedies of the *Myers case* is soundly bottomed on three considerations. These considerations are the necessity for orderly and uniform process, comity between the judicial and the administrative, and adequacy of the remedy at law. No one of these considerations is present here.

This is not a *Myers case* situation. In that case as Mr. Justice Brandeis is careful to point out Congress not only granted by statute sole authority to the National Labor Relations Board "to prevent any person from engaging in any unfair labor practices affecting commerce" but also provided for judicial review of the Board's orders exclusively in the United States Courts of Appeal.[5] The Justice emphasizes the fact that there is no claim that the statutory provisions or rules require anything other than a full and fair hearing and that the order of that Board is

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[4] The opinion in *Skinner and Eddy Corp.* v. *United States, supra,* was written for an unanimous court by Mr. Justice Brandeis, who also wrote the opinion in *Myers* v. *Bethlehem Shipbuilding Corp., supra,* on which the Government placed so much reliance.

[5] Assuming *arguendo* that the Wage Stabilization Board did possess administrative enforcement powers, such powers are not exclusive but existed concurrently with that of the Federal Courts. See section 706 of Defense Production Act of 1950 as amended (50 USC App. 2156(b)).

not self-enforcing as is the one at bar. In that case there was a complex question of jurisdiction. That question can only be determined upon a detailed factual background to be developed at a full hearing before the Board which, on the basis of its expertise, was given exclusive statutory power to decide.

However, its application by the lower federal courts has become so harsh and stringent that many state courts, who have previously followed general principles of administrative law of the federal courts, have refused to follow federal decisions.[6] Likewise, such interpretation has come under the fire of many outstanding writers on administrative law.[7]

In their statement of jurisdiction the defendant-appellants placed much reliance upon *MaCauley* v. *Waterman SS Company*, 327 U.S. 540, and *Aircraft & Diesel Equipment Corporation* v. *Hirsch*, 331 U.S. 752. As we have shown above, the language of this Court in the *Hirsch case* supports the citizen's position rather than that of the agency. The factual and legal situation in that case likewise support our position.

In the *Hirsch case, supra*, plaintiff Aircraft Corporation sought to litigate the constitutionality of the Renegotiation Act of 1947 by seeking to enjoin members of the Board handling recovery of excess profits from proceeding to prevent plaintiff's customers from paying $270,000 to

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[6] *Nolan* v. *Fitzpatrick*, 9 N.J. 477, 89 A 2d 13 (1952); *N.Y. Foreign Trade Zone Operators* v. *State Liquor Authority*, 285 N.Y. 272, 276, 34 N.E. 2d 316, 319.

[7] Stason, "Timing of Judicial Redress for Erroneous Administrative Action", 25 Minn. L. Rev. 560, 576 (1941); Netterville, "The Administrative Procedure Act: A Study in Interpretation," Geo. Washington L. Rev. 1 at 85-86 (1951); Bernard Schwartz "A Decade of Administrative Law: 1942-1951" 51 Michigan Law Review, 775 at 831-836 (1953). Administrative Law Bulletin, Administrative Law Section of American Bar Association, Vol. 5 No. 2 (April 1953) pp. 45-6. 1953 Annual Survey of American Law, 28 New York University Law Review, pp. 116-17. 1949 Annual Survey Am. L. 117.

plaintiff. The significant points of that case in relation to the case at bar can best be summarized as follows:

1. The ultimate ground for the denial of relief was that a suit against the prime contractor, in which the Government would be forced to intervene, was an adequate remedy at law.

2. No fine or penalty was involved, only the adjusted prices to be paid by a Government contractor under a subcontract.

3. Congress carefully considered the matter of review and, following determinations by the Secretary of War and the War Contracts Price Renegotiation Board, provided for a trial *de novo* in the Tax Court.

4. The Court explicitly reserved decision upon the question of the finality of the decision of the Tax Court in those matters.

Present in the *Hirsch case* was an immediately available alternative procedure before the ordinary courts; here there is an attempt to deny resort to the courts. *The Waterman case*, supra, (as well as the other decisions involving the Renegotiation Act) stands on the same footing as the *Hirsch case*. There a second immediate alternative was a trial *de novo* in the Tax Court which Congress declared to be the proper tribunal. Here we have an emergency creature born of administrative action, that has no permanence or tradition of due process, that purports to act under invalid and unconstitutional procedural regulations without the blessings of Congress.

CONCLUSION

WHEREFORE, for the foregoing reasons the plaintiff-appellee moves for a rehearing.

Petitioner's counsel certify that this petition is presented in good faith and not for the purpose of delay and that the petitioner is restricted to the grounds as stated above.

Respectfully submitted,

JERRY N. GRIFFIN

JOHN K. PICKENS
Attorneys for Petitioner
(Plaintiff-Appellee)

MOTION FOR STAY OF MANDATE

The petitioner moves that the mandate of this Court in this matter be stayed until rehearing is had.

By its attorneys

JERRY N. GRIFFIN

JOHN K. PICKENS

J. REX SPURR
Of Counsel

November 1953

APPENDIX A

Statutes Involved

50 USC App. 2105(b):

* * *

"No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation."

50 USC App. 2156(b):

* * *

"The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; the subpena for witnesses who are required to attend a court in any district in such case may run into any other district. The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore

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or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order. No costs shall be assessed against the United States in any proceeding under this Act. All litigation arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General."

50 USC App. 2166(a):

* * *

"Titles I, II, III, VI, and VII of this Act and all authority conferred thereunder shall terminate at the close of June 30, 1953; and titles IV and V of this Act and all authority conferred thereunder shall terminate at the close of April 30, 1953."

50 USC App. 2166(b)(3):

* * *

"Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency."

APPENDIX B

Executive Order #10494

DISPOSITION OF FUNCTIONS REMAINING UNDER TITLE IV OF THE DEFENSE PRODUCTION ACT.

By virtue of the authority vested in me by the Constitution and laws of the United States, including the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*), hereinafter referred to as the Act, and as President of the United States and Commander in Chief of the armed forces of the United States, it is ordered that the functions remaining under Title IV of the Act shall be, and they are hereby, delegated as follows:

Section 1. *Fiscal liquidation.* Such functions as remain in connection with the fiscal liquidation of the Economic Stabilization Agency are hereby transferred to the Secretary of the Treasury.

Section 2. *Administrative proceedings.* The function of conducting administrative proceedings under Title IV of the Act, including the conclusion of those instituted pursuant to section 405 and the taking of necessary actions under sections 407 and 408 of the Act, is hereby transferred to the Director of the Office of Defense Mobilization.

Section 3. *Enforcement and investigations.* In addition to the functions now vested in the Attorney General by the Act, he shall have, and there are hereby transferred to him, the following-described functions under Title IV of the Act: (a) completing the processing of enforcement files, (b) concluding investigations where deemed appropriate, and (c) certifying disallowances (section 409(d)).

Sections 1 and 2 of this order shall become effective November 1, 1953. Section 3 shall become effective immediately.

DWIGHT D. EISENHOWER

THE WHITE HOUSE
October 14, 1953